

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA, : CR 00-930 00-1248 01-1457
: 10 CR 512 11-214
:
-against- :
United States Courthouse
Brooklyn, New York
ALAN BERKUN, :
:
January 5, 2012
Defendant. : 10:30 o'clock a.m.
- - - - - X

TRANSCRIPT OF SENTENCING
BEFORE THE HONORABLE I. LEO GLASSER
UNITED STATES SENIOR JUDGE

APPEARANCES:

For the Government: LORETTA E. LYNCH
United States Attorney
BY: LAN NGUYEN
KATHERINE NANDAN
MATTHEW MUELLER
Assistant United States Attorneys
271 Cadman Plaza East
Brooklyn, New York

For the Defendant: JEFFREY HOFFMAN, ESQ.
SUSAN WOLFE, ESQ.

Court Reporter: Gene Rudolph
225 Cadman Plaza East
Brooklyn, New York
(718) 613-2538

Proceedings recorded by mechanical stenography, transcript
produced by computer-aided transcription.

1 THE COURT: Mr. Hoffman, this was emailed to me
2 yesterday at my request. I don't know that you have had an
3 opportunity to see it.

4 That email that you sent to me, was a copy made
5 available to defense counsel, Mr. Marcigliano?

6 PROBATION OFFICER: Did defense counsel get a copy
7 of the email I sent to the judge?

8 MS. WOLFE: No.

9 PROBATION OFFICER: No. I think that was directly
10 to Your Honor.

11 THE COURT: I made two copies. The Assistant will
12 share it with you. If you want to take a couple of minutes to
13 look at it.

14 PROBATION OFFICER: Officer Betts broke her ankle.
15 She is available by phone. She is unavailable for court.

16 MR. HOFFMAN: May we have just one second to peruse
17 this quickly?

18 THE COURT: Yes. Sit down. You will be more
19 comfortable.

20 MR. HOFFMAN: Thank you.

21 (Pause.)

22 THE COURT: Call the case, please.

23 THE CLERK: This is criminal cause for sentencing in
24 docket number 00-930, 00-1248, 01-1457, 10 CR 512 and
25 11 CR 214, United States versus Alan Berkun.

1 Counsel and Probation, please state your names for
2 the record.

3 MS. NGUYEN: Good morning, Your Honor.

4 Lan Nguyen for the United States.

5 With me are Katherine Nandan from our office and
6 Matthew Mueller from DOJ Tax.

7 PROBATION OFFICER: Good morning, Your Honor.

8 Frank Marcigliano from the United States Probation
9 Department.

10 THE COURT: Good morning.

11 MR. HOFFMAN: Good morning, Your Honor.

12 Jeffrey Hoffman and Susan Wolfe for the defendant.

13 MS. WOLFE: Good morning.

14 THE COURT: Are you ready to proceed, Mr. Hoffman?

15 MR. HOFFMAN: We are, Your Honor.

16 THE COURT: I know you have reviewed the presentence
17 report with the defendant. You have reviewed the presentence
18 report?

19 MR. HOFFMAN: Yes, I have.

20 THE COURT: You have taken a series of objections to
21 them. Why don't we deal with those now?

22 MR. HOFFMAN: I'm sorry?

23 THE COURT: I said, you have taken a series of
24 objections.

25 MR. HOFFMAN: That is correct.

1 THE COURT: And exceptions.

2 MR. HOFFMAN: That is correct.

3 THE COURT: To the presentence reports. Why don't
4 we deal with those now.

5 For the record, you have received a copy of an email
6 that I got yesterday?

7 MR. HOFFMAN: Correct.

8 THE COURT: That indicates what the Probation's view
9 of the guideline advisory determination ought to be.

10 MR. HOFFMAN: Correct, Your Honor.

11 THE COURT: I will hear you.

12 MR. HOFFMAN: I am going to let Ms. Wolfe, if I may,
13 address those.

14 THE COURT: You may.

15 MR. HOFFMAN: Do you want to step over here?

16 MS. WOLFE: Yes.

17 Thank you, Your Honor.

18 The position that we took in our sentencing
19 memorandum is that the -- all of the cases should not be
20 consolidated for purposes of Your Honor's applying the
21 guidelines. The reason for that is, there are three separate
22 plea agreements in this case. The first plea agreement
23 covered the first three docket numbers and the intention was
24 for those cases to be sentenced -- for sentencing on those
25 cases to be consolidated.

1 The subsequent plea agreements gave Mr. Berkun
2 criminal history points for the first cases and it
3 was -- clearly, it wasn't the intention of those -- under
4 those plea agreements for all of the cases to be smushed
5 together and the most onerous guidelines would be applied.

6 THE COURT: The cases were consolidated at your
7 request.

8 MS. WOLFE: They were, Your Honor.

9 Perhaps it was a stupid thing for us to do. The
10 goal was to be able to have one proceeding and one judge be
11 able to look at all of the conduct and hear about Mr. Berkun
12 and who he is and what he's done over the past ten years
13 rather than have to do it three different times in front of
14 three different judges.

15 What we have suggested, which is -- would obviate an
16 ex post facto problem and would result in a fair calculation
17 is to take -- do a calculation of the guidelines for the first
18 three cases, which is, according to the Probation Department,
19 97, I think, to 100 and -- I put it in the papers -- 97 to 124
20 months. Just give me a second. Ninety-seven to 121 months
21 and that calculation incorporates an obstruction of justice,
22 two levels for obstruction of justice, which applied to those
23 cases.

24 If you take that guideline range and then you take
25 the guideline ranges for the other two cases that were several

1 years -- almost ten years later, and those guideline ranges in
2 criminal history Category 2 are zero to six months and 27 to
3 33 months, you would come up with a total range where you
4 stacked the three cases, giving him a bump up for criminal
5 history of 124 to 160 months.

6 We submit that adopting that guideline range would
7 obviate any ex post facto problem and that it is a fair and
8 correct range in this case, which takes into consideration all
9 of his conduct.

10 MS. NGUYEN: Your Honor, the government has no
11 objection to defense counsel's essentially withdrawing the
12 motion to consolidate the cases for sentencing and then having
13 Your Honor hear the first three cases, impose a sentence, and
14 then next impose a sentence for the 2010 attempted securities
15 fraud case and then impose a sentence on the tax -- the 2011
16 tax information.

17 THE COURT: There was a 2010 indictment and a 2011
18 indictment.

19 MS. NGUYEN: Right.

20 There is a 2010 attempted securities fraud case and
21 then a 2011 tax fraud case.

22 THE COURT: Yes.

23 Which guideline would be applied? Would we apply
24 the guideline in effect, the manual in effect at the time this
25 sentence is being imposed?

1 MS. NGUYEN: Yes, Your Honor. I have spoken with
2 Ms. Betts about this yesterday and that was the position that
3 Probation took.

4 PROBATION OFFICER: Yes.

5 MS. WOLFE: Yes. For the latter two cases, it --

6 THE COURT: I am talking about the first.

7 MS. WOLFE: The first? Sorry.

8 THE COURT: The latter two cases, there is no
9 question about what guideline manual ought to be consulted.

10 MS. WOLFE: Yes.

11 THE COURT: With respect to the first three
12 sentences is being imposed now, if the guideline manual to be
13 observed or the advice of the manual were to be observed, it
14 would be the manual in effect at the time that sentence is
15 being imposed which should be applied.

16 MS. WOLFE: Our -- our position is that that would
17 be an ex post facto application of the guidelines. That
18 the -- that all of the conduct -- in fact, all -- all of the
19 conduct covered by those indictment numbers occurred before
20 2000. So that there is no -- several of the guidelines
21 adjustments have been substantially increased in the years
22 subsequent to the conduct. Applying those increases would
23 violate the ex post facto clause.

24 THE COURT: Well, I don't know if that clause is
25 even applicable here.

1 MS. NGUYEN: The government would take the position
2 that there wouldn't be an ex post facto issue because the
3 Sentencing Guidelines are discretionary, advisory, under
4 Booker.

5 MS. WOLFE: Your Honor --

6 THE COURT: I guess semantically the phrase is
7 ex post facto law. There is no law with respect to the
8 application of sentence now. The guidelines were declared
9 unconstitutional some years ago and we had the remarkable
10 oxymoronic situation where an unconstitutional law is
11 nevertheless required to be consulted by a sentencing judge,
12 and if the sentencing court doesn't abide by the advisory
13 guidelines very closely, then the sentence may be regarded as
14 unreasonable, which is absurd for a variety of reasons.

15 I am curious and interested in the last Second
16 Circuit pronouncement with respect to the ex post facto law,
17 namely, the anticipated risk perceived by whom. My
18 understanding is that a defendant has no vested interest in
19 the sentence to be imposed. The statute with respect to, I
20 think it's the 512 indictment, provides for imprisonment up to
21 25 years. Securities offenses provide for imprisonment up to
22 20 years. There is no vested interest that a defendant ever
23 had in where within a statutory sentencing range of zero to 20
24 or zero to five or zero to ten, he had some constitutional
25 right to be sentenced.

1 I don't know whose risk is being anticipated in
2 Ortiz. It seems to run a little bit contrary to what Judge
3 Newman had to decide and write years ago in United States
4 versus Jones, that the guidelines didn't deprive federal
5 judges of their sentencing determinations which they've had
6 from time immemorial.

7 In any event, since there is no disagreement between
8 the government and the defendant, let's get it very clearly
9 stated on the record and let's first, before we even do that,
10 make sure, since the Second Circuit requires the first thing
11 the Court to do is to satisfy the procedural requirement of
12 determining what the guidelines are, let me satisfy that
13 procedural requirement and determine precisely what the
14 applicable guidelines are.

15 If we look at the last submission by the Probation
16 Department, they have a total offense level of 39 and an
17 advisory guideline range of 262 to 327.

18 As I understand it, the parties have agreed that
19 that is not the guideline that should be applied or
20 considered. The parties are taking the position, as I
21 understand it, that there should be a guideline determination
22 of the first three indictments, whatever the guideline
23 determination with respect to those first three cases would
24 be, and then a separate guideline determination with respect
25 to the 2010 and 2011 guideline.

1 MS. NGUYEN: That is correct, Your Honor.

2 THE COURT: So what are they? How are they being
3 arrived at, so that the procedural step that the Court of
4 Appeals requires us to satisfy are satisfied? I don't know
5 whether the Bureau of Prisons is vitally concerned in how that
6 calculation is arrived at.

7 MS. NGUYEN: Your Honor, the government relies on
8 the Probation Department's calculation and I believe that on
9 page six of the addendum to the second revised presentence
10 report, on page six the Probation Department calculates that
11 the range for the first three cases would be 97 to 121 months
12 based offense level of 30 and a criminal history category of
13 one.

14 MS. WOLFE: We agree with that, Your Honor. The way
15 we confirmed that is we looked at the Probation report that
16 was prepared in 2005, using the 2000 guidelines.

17 THE COURT: With --

18 MS. WOLFE: There were certain changes made based on
19 our objections. The 2005 report had included an enhancement
20 for role, which the government and Probation agreed is not
21 applicable. So that was eliminated from the 2005 calculation.

22 Then an additional two levels was added for
23 obstruction of justice based on statements he made to the
24 Probation Department in the year -- between 2005 and 2008.

25 THE COURT: With respect to indictment numbers

1 00-1248 and 00-930 and 01-1457, the parties are agreed that
2 the total offense level which the guidelines would advise
3 would be a level 30 and a criminal history category of one, is
4 it?

5 MS. NGUYEN: That is correct, Your Honor.

6 PROBATION OFFICER: Yes.

7 THE COURT: That would be 97 to 100-what?

8 MS. NGUYEN: One hundred twenty-one months.

9 THE COURT: That's agreed?

10 MS. WOLFE: Yes.

11 THE COURT: With respect to indictment number 10-512
12 and 11-214, what agreement did the parties come to?

13 MS. WOLFE: Probation and the government and the
14 plea agreement all set forth the anticipated -- the plea
15 agreement sets forth the anticipated guideline range and
16 Probation concurred with that when it did its workup. The
17 only -- so the 2010 attempted securities fraud is a level
18 five, criminal history Category 2, and zero to six months.

19 MS. NGUYEN: Although, Your Honor, in calculating
20 the guidelines for the second two offenses, it may make more
21 sense to sentence Mr. Berkun on the first three cases,
22 00 CR 1248, 00-930, and 01-1457 since -- because he's not been
23 sentenced on those cases yet, we would not know exactly what
24 criminal history category he would fall into for the latter
25 two cases in order to --

1 THE COURT: With respect to that, just let me also
2 observe that I entirely disagree with the construction which
3 both the government and the defense puts on 4A1.2 with respect
4 to criminal history category. Your reading of the advisory
5 guideline does not accord with either common sense or a
6 reading of the guideline. To the extent that you rely upon
7 what the guideline definition of prior sentence is, what you
8 omit to take notice of, in looking at 4A1.2, 4A1.2(a)(1), the
9 reading that both the government and the defense has is that
10 4A1.2(4) is not applicable because prior sentence winds up
11 with reading for conduct not part of the instant offense.

12 In the first place, if you look at 4A1.2(a), it says
13 the term prior sentence means any sentence previously imposed.
14 No sentence has been previously imposed. Therefore,
15 4A1.2(a)(1) clearly is not applicable. 4A1.2(4) is entirely
16 applicable just as a matter of common sense. Where a
17 defendant has been convicted of an offense -- and he has been
18 convicted of an offense. He's pleaded guilty. He hasn't been
19 sentenced yet but he's pleaded guilty to all five
20 indictments -- but not yet sentenced, such conviction shall be
21 counted as if it constituted a prior sentence under 4A1.1(c)
22 of a sentence resulting from that conviction that would
23 otherwise be countable. Otherwise, you'd have what you have
24 here. You'd have five convictions and you have a criminal
25 history category of one.

1 MS. NGUYEN: Your Honor --

2 THE COURT: Which obviously flies in the face of
3 common sense.

4 In any event, it is academic given the view that you
5 are all taking; and in view of the view that you are all
6 taking as to what the agreed guideline is and what the agreed
7 criminal history is, that's almost the equivalent of an
8 11(e)(1)(C) sentence, an agreed upon sentence. So all of this
9 construction with respect to 4A1.2(a) and so on is really
10 academic.

11 Okay?

12 MS. NGUYEN: Yes, Your Honor.

13 THE COURT: Which is what it all amounts to. You
14 are agreeing upon what the guideline sentence is. So it is in
15 effect an agreed -- not an agreed sentence but an agreed
16 guideline application. It is a analogous to an 11(e)(1)(C)
17 sentence.

18 Let me have the next two. So we will sentence
19 Mr. Berkun on the first three indictments to which he's
20 pleaded guilty and then we will proceed to the other two. So
21 I need to have Mr. Berkun allocute, to tell me what he would
22 like to say in mitigation of sentence. Let us assume that
23 sentence has been imposed with respect to the first three and
24 the criminal history category would be what, on the next two?

25 MS. NGUYEN: Your Honor, for 10 CR 512, which is the

1 attempted securities fraud, the Probation Department and the
2 government agrees, has their estimate on -- also in the
3 addendum to the second revised presentence report on page
4 three, that the base offense level for that would be seven,
5 with a two-point reduction for acceptance of responsibility,
6 would be five. And then the criminal history category,
7 assuming that Your Honor sentences him on the first three
8 cases to a sentence that would give him a criminal history
9 category of two -- of two or three points, would land in
10 criminal history Category 2 and would call for a sentence from
11 zero to six months.

12 THE COURT: On the last two indictments?

13 MS. NGUYEN: On the -- on 10 CR 512 and then on the
14 tax --

15 THE COURT: Yes.

16 MS. NGUYEN: -- count, which is set forth on page
17 four of the second amended -- second addendum would be
18 adjusted offense level of 20, minus three points for timely
19 acceptance of responsibility, also assuming that the defendant
20 has a criminal history category of two, would call for a
21 sentencing range of 27 to 33 months.

22 THE COURT: Ms. Wolfe?

23 MS. WOLFE: We agree with that.

24 THE COURT: What's the total offense level on the
25 last two?

1 MS. NGUYEN: The last --

2 MS. WOLFE: The last one is 27 to 33 months.

3 THE COURT: Offense level being what, criminal
4 history category being what?

5 MS. WOLFE: Seventeen.

6 THE COURT: Pardon?

7 MS. WOLFE: Seventeen.

8 THE COURT: Seventeen, and two.

9 MS. WOLFE: Seventeen, criminal history Category 2,
10 yes.

11 THE COURT: Okay. So it is 97 to 121 and 27 to 33
12 to be imposed, theoretically, consecutively. Yes?

13 MS. NGUYEN: That is correct, Your Honor.

14 MS. WOLFE: Yes.

15 THE COURT: Okay. I am going to ask the Probation
16 Department to prepare a revised, an updated amended
17 presentence report.

18 PROBATION OFFICER: Okay, Your Honor.

19 THE COURT: Given these calculations.

20 PROBATION OFFICER: Reflecting these calculations.

21 THE COURT: So we are agreed on what the advisory
22 guidelines should be.

23 With respect to the rest of the presentence report,
24 are there any objections with respect to those?

25 MS. WOLFE: The remaining objections that we have

1 are on the last page of our -- on page 14 of our sentencing
2 memo, and we -- we ask the Court to redact or to omit certain
3 paragraphs which refer to violent organized crime related
4 activity that Mr. Berkun was -- was not involved in. Those
5 were on pages 19 and 31.

6 The reason we ask that is because they -- in our
7 experience, these types of allegations, which don't involve
8 Mr. Berkun --

9 THE COURT: They do involve Mr. Berkun. Let's get
10 that out of the way. It's very clear, that he knew he was
11 involved with organized crime figures. There is no question
12 about that. Whether or not it ought to be redacted is
13 something else, as a matter of consideration for Mr. Berkun,
14 to put it charitably. But it is not correct to tell me that
15 Mr. Berkun was not involved with organized crime. He was.

16 I have been involved with this and related cases now
17 for some years. What brought these cases to light essentially
18 was the invasion of organized crime into Wall Street and that
19 goes back to the Cappa case and to Arbel and to all the
20 others. Organized crime was in it up to its ears and
21 Mr. Berkun knew it. And if you read the last submission which
22 I gave you this morning, he met with Politto. He was involved
23 with organized crime.

24 What else?

25 MS. WOLFE: I hear what Your Honor is saying and the

1 fact that he -- we don't dispute that he knew. In fact, part
2 of his conversation with the Probation Department. But the
3 Probation report does not include everything, all of the facts
4 and circumstances of this case. In fact, the 2005 Probation
5 report had various factual paragraphs that weren't in the 2011
6 guidelines.

7 The point being, that it's -- it's a matter of
8 discretion on the part of the Probation office what -- how
9 many factual details to include and I ask the Court --

10 THE COURT: Before you get to that, Ms. Wolfe,
11 again, if you look at Section 3661, I think -- as I get older
12 my accuracy with respect to numbers may vary a little bit -- I
13 think it's 3661 or thereabouts, which says there is no
14 information which should not be available to the government
15 with respect to determining what a sentence is. The
16 guidelines or the advisory guidelines say that too. No
17 information should be unavailable.

18 Is it 3661?

19 MS. NGUYEN: It is, Your Honor.

20 THE COURT: What does it say?

21 MS. NGUYEN: Use of Information For Sentencing.

22 No limitation shall be placed on the information
23 concerning the background, character and conduct of a person
24 committed of an offense which a court of the United States may
25 receive and consider for the purpose of imposing an

1 appropriate sentence.

2 THE COURT: Okay?

3 MS. WOLFE: We agree, that it -- it's appropriate
4 for -- to be in the PSR for Your Honor's consideration. We
5 ask you in your discretion to exclude it as this PSR follows
6 him for whatever period of time it will.

7 THE COURT: Does the government want to be heard on
8 that? Does the government want to leave it to me?

9 MS. NGUYEN: Your Honor, we leave it to the Court's
10 discretion.

11 THE COURT: Why don't you remove it?

12 Let me have the specific -- what are the lines?

13 MS. WOLFE: Paragraph 57. I just want to make sure
14 that it is the same in the most recent PSI.

15 THE COURT: October 7, 2011? Is that the SR you are
16 looking at?

17 MS. WOLFE: Yes. Actually, it will be the same.
18 Because the -- the changes I believe were made through an
19 addendum.

20 So there is paragraph 57 and subparts E through F,
21 which detail the -- the violent activities.

22 THE COURT: For the benefit of the Probation
23 Department, we are on paragraph 57 of the presentence report.

24 MR. HOFFMAN: Your Honor, while -- while we are
25 doing that, Mr. Berkun has an inguinal hernia that is acting

1 up. He asks if he can sit down.

2 THE COURT: He can sit down.

3 MR. HOFFMAN: Thank you.

4 MS. WOLFE: Yes, it is paragraph 57.

5 THE COURT: Subdivision -- starting with
6 paragraph -- subparagraph E. Not paragraph.

7 MS. WOLFE: E and F.

8 THE COURT: E and F. Okay?

9 MS. WOLFE: And then paragraph 31 -- page 31,
10 paragraph 102. No. That's not correct.

11 THE COURT: No. They are talking about -- those are
12 other defendants.

13 MS. WOLFE: It actually is paragraph 98. No.

14 MR. HOFFMAN: No.

15 MS. WOLFE: No, it is not paragraph 98, Your Honor.
16 I am -- I am trying to correlate it with changes that have
17 been made.

18 (Pause.)

19 THE COURT: There was an addendum dated January 5th
20 which contained references to all of that. Let's not take too
21 much time with that now, Ms. Wolfe. You can find it later.

22 MS. WOLFE: Okay. I will, Your Honor.

23 THE COURT: Let me know what it is you are
24 requesting.

25 MS. WOLFE: I will.

1 THE COURT: Is there anything else, Ms. Wolfe?

2 MS. WOLFE: No, Your Honor. Those are our
3 outstanding objections.

4 Thank you.

5 THE COURT: Do you want to be heard beyond that?

6 MR. HOFFMAN: May I, Your Honor?

7 THE COURT: Does Mr. Hoffman want to be heard?

8 MR. HOFFMAN: Thank you.

9 THE COURT: Yes.

10 MR. HOFFMAN: Thank you, Your Honor.

11 If I may, and I will try not to be too wordy.

12 In this instance, I must tell the Court that I've
13 known Alan prior to my representation of him in these matters.
14 Our office represented him for some years before. I will call
15 him Mr. Berkun.

16 Mr. Berkun was a securities -- a young securities
17 lawyer then and ultimately decided, which typically is a
18 mistake for lawyers, I found, that since his clients were
19 doing so much better than he and since he was so much smarter
20 than they, it would not be bad idea to get into that business
21 so he could do as well as they were doing.

22 When he did that, he wound up finding out that there
23 were reasons that they were doing so much better than he. He
24 fell prey to falling into doing those things, knowing they
25 were wrong and knowing they were violations of the securities

1 law, and basically in a nutshell it was pump and dump kind of
2 stuff that was going on, I guess still goes on, but was
3 particularly going on pretty raucously in those days.

4 The first thing he got involved with was this
5 US Bridge entity which was a company that wanted to increase
6 its -- the value of its shares so it could make money. He got
7 involved with those people, one of whom Your Honor just
8 mentioned, and he found shortly after doing so that he was way
9 in out of his depth. I think you may have read it in the
10 presentence report.

11 He wound up after a meeting in a diner and being
12 told what money he has to supply them, whether or not his
13 activities are successful, put in the back of a truck with a
14 foot on his neck and a gun that was put to his head and
15 clicked and was told oops, it misfired. And that was his real
16 introduction at that point in time as to what he was truly
17 involved in.

18 He ultimately settled the US Bridge matter with the
19 SEC in a civil suit. That's when we first met him, and, in
20 fact, paid all of the restitution that was required by the SEC
21 for the victims. So he obviously, from a financial
22 standpoint, did not come out very well either personally in
23 terms of having to pay all that back, which he did, as well as
24 what he had to pay the organized crime guys that he was
25 involved with.

1 At that point in time, he decided he wanted to get
2 out of the business and he sold it to a fellow named Hunter
3 Adams and his crew, bad guys; and he was asked to stay on,
4 because they didn't know how to deal with the regulators, to
5 stay on for a while when the transition was made.

6 He did that and they asked him again at a point in
7 time to be a front for some people so that he could -- so that
8 they could again play games with stock. He did that. He
9 wasn't involved in all their other machinations but in that
10 one situation he did it. He was the front. He was given ten
11 percent. I think it was about a \$5 million raise, and he got
12 ten percent of it for his fronting for these other true owners
13 of the stock.

14 During that time, he was in his office and he got a
15 call from some folks that he dealt with saying please come
16 over to our office. We need your help on something. He had
17 his little four or five-year old son with him. I forget what
18 holiday it was. It was Erev Yom Kippur and he ran over there,
19 because he had to leave early that evening, and what he was
20 confronted with was his friends and a group of other people he
21 didn't know and they said these guys have \$50,000. They want
22 to get it into the bank. Can you help them? It turned out
23 that their bank was his bank. So he said yeah.

24 And during that conversation one of them said, you
25 know, this is narcotics money. And Alan, being a smart-aleck

1 at that time, said I don't care what it is. You want me to
2 move money from my account to your account, I'll do that. The
3 reward was \$5,000 which he split with the two other people and
4 then he left and went home.

5 That's the money laundering count.

6 After he was charged with those crimes that I have
7 just mentioned, I represented him and he in rather short order
8 met with the US Government. Most of the Assistants are no
9 longer around, one of whom I just saw and hadn't seen in many
10 years, Nikki Kowalski, who was a part of that, of representing
11 the government at some point in time in those matters.

12 He cooperated fully. He not only cooperated in
13 terms of normal cooperation, telling them everything he knew,
14 agreeing to cooperate, being debriefed innumerable times, some
15 with me and most without, but there were other instances where
16 the government came to him on situations that they heard
17 about, such as somebody who was involved with phony IDs or
18 Social Securities, asked him to make some calls. He did that.
19 What he was asked to do, he did.

20 And, in addition to which, he gave
21 them --them meaning the government -- everything he had. He
22 gave them stamp collections, which they auctioned off and got
23 money from. He gave them whatever cash he had. He gave them
24 all the stock he had in a company called MedGen, which they
25 never did anything with. They just let it lay fallow. Today

1 that stock is worth probably \$30.00. At that time it was
2 thousands and thousands of shares that were selling somewhere
3 around a dollar-and-a-half or \$2. I am not faulting the
4 government. I'm just telling you the facts. The facts are
5 that nothing was done with those stocks.

6 Even without them having sold those stocks as best
7 they could, he still wound up giving the government a few
8 million dollars. And as the presentence report indicates, out
9 of all of the defendants in all of the cases, the total amount
10 of money that Alan gave is approximately two-thirds of the
11 claims that were made by people who were victimized.

12 The -- I don't know from the presentence report
13 whether anybody else contributed, whether the other third is
14 just -- was never paid or any contributions were made toward
15 it. So I can't comment on that but I can comment on what they
16 said, which is true, in terms of what he turned over.

17 He tried to remake a life in Florida. His wife in
18 New York, understandably based on all that had happened, left
19 him. He had two little kids here in New York, and to this day
20 his ex-wife will say and has said that he paid everything he
21 was to pay in support of those kids.

22 Fortunately, he also was able to put money into an
23 account for the children for their college education, one of
24 whom is now in her second year of college, the other who is
25 about to go to college. Those obligations are taken care of

1 and he's without any further financial obligations to them.

2 It doesn't mean he won't do what he can because he always has.

3 I want you to know that's the way he handled that situation.

4 He met a girl in Florida, Kimberly Thomas. They
5 fell in love and they wound up having three children together.

6 There was a letter forwarded to Your Honor, hopefully you got
7 it yesterday, from Kimberly, who I spoke to last night and I
8 will get to that in a second.

9 He supported her and those three kids. He worked
10 for a company called MedGen, the very company whose stock I
11 alluded to earlier, was turned over to the government for
12 disposition.

13 During all of those years he cooperated, as I said,
14 with the government on an ongoing basis when they needed him.
15 Obviously, they didn't need him every day. Even to the point
16 where Mr. Arbel, who the Court has just mentioned, they asked
17 for assistance from Alan on what he knew about Arbel and he
18 told them everything and he would have been a potential
19 witness in that case. I think Mr. Arbel and his
20 lawyers -- not I think -- I know had become aware of that and
21 Mr. Arbel pleaded shortly after his trial began, if I remember
22 correctly.

23 Had that been the situation, at some point in time
24 we would have been standing before Your Honor saying based on
25 all that and based on everything he had done, his cooperation,

1 his restitution, all the monies he paid, he deserved a
2 significant break vis-a-vis his cooperation. And I believe
3 had we been standing before Your Honor under those
4 circumstances, there is no doubt in my mind that the
5 government would have given you a significant 5K1 letter
6 showing all the substantial assistance that he gave and we
7 would be able to tell you at that point in time all that he
8 had done in his daily life as a reformed person.

9 However, the pressures, the financial pressures of
10 continuing to support his two kids up north, and now having
11 this new family in the south, were tremendous, and he fell
12 behind on his taxes and fell behind on his taxes and fell
13 behind on his taxes for a number of years, in trying to make
14 all those ends meet. I am not saying that's an excuse. There
15 are lots of us who have all kinds of financial problems and
16 one way or another we make our tax burdens. I am just giving
17 you the facts as to what actually happened.

18 A few years ago, I think it was in 2009, or ten, I
19 forget these days, he gets into a conversation with his -- his
20 and his family's stockbroker, a person that he knew for many,
21 many years, and who he had a long-standing fiduciary
22 relationship with.

23 During that time, the broker says to him, you know,
24 I'm in bad shape. My company is not happy with me. The
25 broker I believe was in his late seventies at the time. I am

1 not producing any money. What can we do? Can you help me
2 out?

3 Alan said to him, there is a stock that I think I
4 can get. If I get it, if you have some of your brokers buy
5 it, it will help move it up and we can make some money. Wait
6 until you hear from me.

7 He didn't know he was talking to a broker who had
8 gotten in trouble and was working for the government. Again,
9 this was an absolute violation of law. He knew it. He
10 thought about it. His financial situation was as I have just
11 described.

12 It turned out he never got the stock and he never
13 could do the deal and never did do the deal. However, he got
14 a further call from the broker saying, I -- in essence, I
15 didn't wait. I had a few of my brokers, friends of mine, buy
16 the stock in the open market. And Alan said, well, that was
17 silly because I don't have -- I don't own the stock. So it is
18 of no value. He said well, but I did it and it cost me \$1,200
19 that I had to pay those guys. Alan, feeling it was his fault
20 that this guy went out of pocket, sent him the \$1,200 in cash.

21 And that's the attempted securities fraud that he's
22 pleaded to and stands convicted before Your Honor to be
23 sentenced on.

24 He has been in jail for 22 months. He has been in a
25 holding facility for 22 months. He hasn't seen fresh air for

1 22 months other than when he's come to court and is moved
2 quickly into a vehicle.

3 I am not going to go through all the horrors of the
4 MDC. I'm sure Your Honor has heard it a million times. But I
5 have seen a tremendous transformation in Alan. The guy who I
6 knew as a bit of a smart-alecky guy, who was always looking
7 for an angle, isn't the guy that I have been visiting over the
8 last approximately two years at MDC.

9 While he's always been a good father, he's always
10 been a caring family person, he has seen what it is like to
11 have all that taken away; not taken away undeservedly but
12 taken away. And that's something he just had never
13 experienced before. I don't believe he will ever do anything
14 that could jeopardize the freedom to walk from one room to
15 another with a child or be with his family.

16 His wife -- I call her his wife. The mother of his
17 children, Kimberly, called me last night about 10:30. She was
18 very upset and what she was upset with was the lateness with
19 which she got the letter to Your Honor and the fact that she
20 forgot to put in there why she wasn't here.

21 She was crying and she basically said taking care of
22 three kids, ages eight down to I guess it's three or four,
23 alone, without the kind of finances that she can even bring
24 someone in to give her a break for a day or two, has been
25 tough. It's why she didn't get the letter out. That's why

1 she is not here. But she asked me to tell you that and she
2 wanted you to know that.

3 Alan sent you a letter as part of the submission
4 which I must tell you I read and was -- I think it's pretty
5 accurate with the Alan that I have now come to know, who is
6 really a different guy. He wants to speak to Your Honor. He
7 should speak to Your Honor. I said to him, and maybe I
8 shouldn't have, out of knowing a person for 12 or so years now
9 and knowing the nature of the person that I knew for the last
10 eight or nine years as opposed to the last two years, you
11 know, don't be a smart-aleck. Talk from your heart and let
12 the judge see who you are today.

13 So I would ask the Court obviously, as defense
14 lawyers do, to give Alan the best sentence you think you can
15 in terms of what he truly did, including his falling off the
16 wagon, so to speak, and -- after seven or eight years of
17 being -- doing everything he had done.

18 In terms of what's necessary, what's a necessary
19 sentence, to deter him from ever doing anything wrong again,
20 to take into consideration the seriousness of what he has
21 done, I don't know how judges make that determination. I
22 think it is mind-boggling. But it is something you have to
23 do.

24 He did all the right things after he was caught. He
25 fell off the wagon and did the things he did and they are

1 there and they are part of what you have to consider.

2 I think the heaviest sentence of all the people that
3 I saw, including -- I am referring to Hunter Adams, who ran
4 everything and had all kinds of schemes and was definitively
5 let's-go-out-and-rob-the-nation kind of person, was around
6 96 months, if I remember correctly. I think it was something
7 just in the nine-year range. I'm sorry. One hundred eight, I
8 was reminded, months.

9 While Alan doesn't have 5K1 letter, the Court can
10 certainly consider all the assistance he did give to the
11 government and I put that before the Court.

12 I think Alan would like to address Your Honor.

13 THE COURT: Does the government want to be heard?

14 MS. NGUYEN: Yes, Your Honor, briefly.

15 I just want to clear up some things from a
16 chronology standpoint.

17 The government does not have -- does not disagree
18 that the defendant did make efforts to cooperate with the
19 government, was in a cooperation agreement, did get prepped
20 for trial and did provide information about other illegal
21 conduct that he knew about.

22 But it is not quite fair to view that conduct
23 between '98 and 2001 and then there being a large gap of time
24 and then Mr. Berkun fell off the wagon in 2008.

25 The tax charge -- and Mr. Mueller will go into this

1 in more detail -- those charges are from 2001 to 2005.
2 Mr. Berkun pled guilty to them in 2011 but he was engaged in
3 that conduct at the same time that he professed to be a
4 cooperator with the government.

5 Then the second thing I would like to point out is,
6 just from a factual standpoint, for the 2008 attempted
7 securities fraud, Mr. Hoffman sort of condensed the activities
8 to make it seem like there was one discussion and then the
9 next discussion Mr. Berkun had with the cooperator was that
10 the stock had already been purchased. There was another
11 conversation in-between so that it wasn't that Mr. Berkun had
12 brought up this pump and dump scheme and then found out it had
13 been executed. There had been another conversation where
14 Mr. Berkun indicated that he was interested in participating
15 in the pump and dump scheme.

16 I am going to turn over to Mr. Mueller to speak on
17 the tax case and I know that Ms. Nandan may have something on
18 the value of the MedGen stock.

19 MS. NANDAN: If the Court is interested.

20 MS. NGUYEN: Mr. Hoffman indicated that the
21 government -- that the MedGen stock had been worth something
22 in thousands of dollars. The government didn't sell it.
23 That's not quite accurate.

24 MS. NANDAN: In 2002, Your Honor, at the time of the
25 forfeiture order, MedGen stock according to SEC filings was

1 trading at about ten or eleven cents a share. In 2003, the
2 stock price did jump to over a dollar. However, that was
3 after an eighty-to-one reverse split.

4 I don't have all of the stock prices. I will say,
5 that the stock has traded on both Over-the-Counter and the
6 Pink Sheets under different ticker symbols. I do have notes
7 in my file going back at least three years, or close to three
8 years, of discussions with the Marshal Service about their
9 inability to sell the stock given its very low value.

10 So I don't know that that's material to the
11 discussion we are having here. Mr. Berkun did in fact
12 surrender the shares of stock as he was required to do and as
13 he agreed to do. The Marshal Service does have it.

14 Our proposed final order does ask the Court to
15 vacate the consent order insofar as it directed the forfeiture
16 of those shares simply because the Marshal Service cannot sell
17 them. The current value as of a few weeks ago was under
18 \$15.00. So we are going to ask in the final order that the
19 Court vacate the forfeiture of those shares.

20 But that simply clears up a factual matter that,
21 again, I don't believe is necessarily relevant.

22 THE COURT: There was about an \$800,000 forfeiture?

23 MS. NANDAN: He paid that money to the Clerk of
24 Court. All of that was paid. He surrendered the shares as
25 was required.

1 In hindsight, should we have sold in 2003 when they
2 were trading at more than \$11? You know, I would agree with
3 that. But he surrendered the shares. He paid the money as
4 required and he has consented to the forfeiture of stamps that
5 were seized in 2007 and the proceeds of those sales. There
6 really is no dispute with respect to the forfeiture.

7 Ms. Nguyen had raised the -- and Mr. Hoffman had
8 raised the issue of the price of the stock, and given
9 that -- just that the Court understands, it -- it never
10 really -- it's always been a -- except for the -- historically
11 been a penny stock, Your Honor, unfortunately, that the
12 marshals are currently unable to sell.

13 THE COURT: While we are on that, just let me make
14 certain we are on the same page as far as restitution is
15 concerned. The presentence reports that I have, and there are
16 any number of them, and a number of addenda, on Count One of
17 the 00-1248 indictment, reports indicate restitution would be
18 ordered in the amount of \$16,570,671.00.

19 MS. NANDAN: I believe, Your Honor, there was a
20 three point --

21 THE COURT: There were 39 victims that you have
22 information on. There are a number of charts --

23 MS. NANDAN: Correct, Your Honor.

24 THE COURT: -- in the presentence report, which add
25 up to I think it was three million or 39,000,000.

1 MS. NANDAN: Yes. I believe it's at pages 25
2 through 27 of the second revised PSR. The Probation
3 Department has listed the victims and their loss amounts.

4 THE COURT: Yes. 390,590.

5 MS. NANDAN: I'm sorry? Oh, I am looking --

6 THE COURT: It's \$3,684,199.

7 MS. NANDAN: That is correct, Your Honor.

8 THE COURT: Paragraph 89.

9 MS. NANDAN: Correct.

10 We would ask the Court to include the list of
11 victims and loss amounts in the judgment in compliance with
12 the MVRA as well as to facilitate the return of the monies to
13 them.

14 THE COURT: \$3,684,199. Right?

15 MS. NANDAN: Correct.

16 THE COURT: Then there was restitution to be made to
17 the IRS?

18 MS. NANDAN: That is correct, Your Honor.

19 THE COURT: That was in the amount of \$390,590?

20 MS. NGUYEN: That is correct, Your Honor.

21 THE COURT: The restitution figure should be
22 \$3,684,199.03? Those are to the victims listed on paragraph
23 89 of the PSR and \$390,590 to the Internal Revenue Service.
24 Is that correct?

25 MS. NGUYEN: That is correct, Your Honor.

1 THE COURT: All right.

2 MR. HOFFMAN: I think the government's figure as to
3 the restitution made to the victims was 2,384,000. Is that
4 right?

5 THE COURT: It's \$3,684,199.

6 MR. HOFFMAN: That's what's due. That's what
7 they --

8 THE COURT: That's the amount of restitution which
9 is due to the victims listed in paragraph 89.

10 MR. HOFFMAN: Right. But I believe that Mr. Berkun
11 paid 2.384 -- of two -- I'm sorry -- 2.362 million of that.
12 That's the only point I wanted to make.

13 THE COURT: Is that correct?

14 MS. NANDAN: I don't have the totals, Your Honor. I
15 don't know whether and to what extent there has been interest
16 earned. But significant payments have been made.

17 However, I would suggest that the proper course
18 under the law is to impose the full amount of restitution and
19 then he will be credited for that once those --

20 THE COURT: The other alternative is, I think the
21 statute provides for a period of 90 days to make a final
22 determination with respect to restitution. You can do it
23 either way.

24 MS. NANDAN: I think -- the statute does provide
25 that, Your Honor.

1 I think the names and the loss amounts we have
2 agreed upon. That's properly included in the judgment. The
3 only question right now is exactly what that credit is, which
4 doesn't need to be reflected in the judgment. That's really a
5 credit-debit thing that's done through the clerk's office and
6 our office.

7 THE COURT: All right. We will direct that
8 restitution be made in the amount of \$3,684,199.03, minus
9 payments which have already been made, a determination of
10 which will be given to the Court in the final judgment with
11 respect to that.

12 MS. NANDAN: Yes, Your Honor.

13 MR. MUELLER: May I BE heard BRIEFLY on the tax
14 case, Your Honor?

15 THE COURT: Yes.

16 MR. MUELLER: Just two -- I won't belabor the
17 point, paragraphs 83 through 87 of the PSR have not been
18 objected to. They lay out the conduct underlying the tax
19 conviction.

20 But I did want to just mention that, as Mr. Hoffman
21 characterized this period of time as simply falling behind on
22 your taxes, I think if you take a look at the table that's
23 laid out in paragraph 87, and we are dealing with between 2001
24 and 2005, in the ballpark of \$1.3 million of unreported
25 income. This seems to me more refusal to pay your taxes, not

1 simply falling behind on your taxes. Not to mention the
2 proactive affirmative steps that were taken in terms of being
3 paid through nominee entities and offshore accounts.

4 I just wanted to get that on the record, Your Honor.

5 THE COURT: I have that very, very clearly in front
6 of me. Total unreported income of almost
7 one-and-a-half-million-dollars, \$1,394,000. I have it.

8 Mr. Berkun, what would you like to say to me this
9 morning?

10 THE DEFENDANT: Good morning, Your Honor.

11 My saga starts as follows. Approximately 17 years
12 ago, I committed securities fraud, I committed money
13 laundering and I pled guilty to those crimes.

14 Mr. Hoffman represented me and I determined that I
15 would cooperate with the government and at that time I did
16 cooperate with the government and I also made some substantial
17 restitution for those crimes.

18 I should be standing here, Your Honor, as
19 Mr. Hoffman said, with a glowing 5K report and I probably
20 should have put all this past me. But, unfortunately, Your
21 Honor, my saga doesn't end there. Because I continued to
22 commit crimes. I violated the law. I did not pay my taxes.

23 And then, if that wasn't bad enough, Your Honor, I
24 committed a second crime. I succumbed to a government sting
25 operation whereby I got involved in another securities fraud,

1 or attempted securities fraud, for lack of the terminology.

2 Again, I take full responsibility for those crimes.
3 I realize what I did was wrong and I apologize to the Court,
4 to the government and of all the individuals that got hurt in
5 that report, I would personally apologize to all of them.

6 And because of that conduct, Your Honor, I paid a
7 hefty price. I was imprisoned for the last 22 months. And I
8 wake up every day, Your Honor, and what I did eats at me. I
9 say to myself, how could I have violated the law a second
10 time. And I say it loudly. I say, how could I have violated
11 the law a second time.

12 I don't have an answer, but I do know one thing,
13 Your Honor. That lost my freedom. I lost an opportunity to
14 be with my family, to hold my children, to have privacy, and
15 as Jeff said eloquently, just to bask in the basic sunlight
16 and breathe fresh air.

17 I wrote to you in my letter, Your Honor, all the
18 hardships that I faced in that prison, in that hellhole over
19 there at MDC. I'm sorry to use that language but that's what
20 it is. I suffered there and I realized that only I put myself
21 in that situation, as terrible as that seems.

22 But I've had a lot of time to reflect on what I have
23 done and the bad activities and the crimes that I have
24 committed and I realize, Your Honor, that I'll never violate
25 the law again. I'm not that person that went there. I don't

1 even think, Your Honor, I would try to make a red light or
2 yellow light ever again because I have suffered there and
3 everything that I took for granted I lost. So I've had a good
4 opportunity to reflect on those things.

5 The last time I was in court, Your Honor, I
6 understand that it was your 40th or 41st anniversary on the
7 bench, and I realized that after all those years, numerous
8 defendants stand here and apologize for their actions. I
9 tried to focus on that because words -- it is just words but I
10 thought that in terms of trying to rehabilitate myself, trying
11 to fix myself as a man, trying to take that brain, whatever it
12 was in me beforehand, and clean myself up, I would have to do
13 something more than just have words. Because at MDC, Your
14 Honor -- and the judiciary is well aware of this -- there is
15 no rehabilitation.

16 The 22 months that I have spent in the prison I have
17 become adept at crossword puzzles, 16 hours a day of
18 television. They offer nothing for anybody to fix themselves.
19 So I turned to my faith because we believe that it is not only
20 words, it's action, it's deeds, and we are measured by that.

21 So I took the time, Your Honor, to first volunteer
22 and then become a GED teacher, five days a week. And on top
23 of that, I was able to convince the warden to run a program at
24 night, three nights a week, and I am proud of that. I've had
25 over 20 inmates pass the examination. I have given hope to

1 people that have despair, that are institutionalized.

2 And I had one of the inmates write to you. I have
3 with me, Your Honor, a second letter and the reason that I
4 didn't mail it to you was because this inmate got his results
5 on Friday before the New Years's Eve holiday. The mail is
6 terrible at MDC. You can put something in the mail, it shows
7 up two, three weeks later. I didn't want to just take a
8 chance so I was wondering, Your Honor, if I could read it into
9 the record or just give it to you.

10 THE COURT: If you like.

11 THE DEFENDANT: I'd like to, Your Honor.

12 Dear Judge Glasser -- it is dated 12/30/11, Your
13 Honor, the date that the inmate received his results for
14 passing the GED.

15 My name is John Eberling. I am an inmate at MDC
16 Brooklyn and confined to the same quarters as Mr. Alan Berkun.
17 I wanted Your Honor to know how Mr. Berkun personally helped
18 me obtain my GED degree and also what kind of man he is.

19 I attended Mr. Berkun's classes in the unit. He
20 devoted three nights a week to teach me the subjects. He
21 spent his weekend marking tests and pushing me to study so I
22 could pass the exam. In fact, my first test results were lost
23 so I had to sit for the exam a second time. Mr. Berkun
24 inspired me not to give up and because of his efforts I passed
25 the exam.

1 I'm also the head orderly on the unit. We live in
2 hellish conditions at the facility. Mr. Berkun pestered the
3 warden and his staff and had the unit environmentally cleaned.
4 All the bird feces and mold were finally removed because of
5 his letter writing and complaining. I can truly say -- in
6 quotes -- we all breathe easier because of him.

7 Although I'm an inmate like Mr. Berkun, please
8 consider this when you sentence him.

9 Thank you.

10 I have that for you now. I didn't put it in the
11 mail because of the chance that it wouldn't get here.

12 So on top of the hard work that I have put in at the
13 prison, Your Honor, I thought long and hard and I realized
14 that I guess the best way to summarize everything is to think
15 about what ex-president Clinton said. He said that it's okay
16 to fall down but it's not okay to lay on the ground.

17 And I have tried to pick up the pieces of my life
18 and not lay on the ground, get out of that abyss and make
19 something of myself, as hard as it may seem under the
20 circumstances. I believe I am ready to return to society, to
21 continue to redeem myself, but I understand that there are
22 some dire consequences to my entire crimes and my behavior.

23 Again, I apologize to the Court and to everybody
24 here.

25 I have two housekeeping matters, Your Honor, that I

1 would appreciate if you could attend to, since I have the
2 floor right now.

3 The first one is, Your Honor, assuming that you
4 determine that I need further incarceration, I would implore
5 the Court to send me to a facility in Miami. There is a camp,
6 there is a low, my white collar crimes and the type of crimes,
7 without violence, would allow me to go to those facilities to
8 finish out my incarceration.

9 I haven't seen -- I haven't seen my children or my
10 wife in 22 months and I would think that if the Court could be
11 merciful and let me see them. Excuse me, Your Honor.

12 The second thing is, my medical condition, Your
13 Honor. I have an inguinal hernia. Without going into all the
14 details, Your Honor, in May of the -- this year -- excuse
15 me -- of 2011, I visited the Medical. When they diagnosed me,
16 my medical -- it was two-by-two centimeters. They told me
17 that it's not life-threatening and it's reducible. Without
18 going into the mumbo jumbo of the medical field, Your Honor,
19 what reducible means is that, as it occurred here, numerous
20 times during the day I have to lay in bed and push my
21 intestine back through a hole in my body. It makes it very
22 difficult. I don't eat that well. I don't sleep that well.
23 And they are indifferent.

24 Now, I know I have remedies and I followed those
25 remedies, Your Honor. I filed every single administrative

1 appeal that's possible. In fact, Your Honor -- and I am going
2 to introduce this to you -- I copied my entire file. I filed
3 my final appeal to Washington on 10/23/11 and I have the
4 paperwork which I would like to submit to Your Honor. They
5 have 60 days to respond. Simple mathematics, that was the end
6 of December.

7 The Bureau is not interested to help me. And if I
8 am to continue with incarceration, I implore the Court,
9 instead of me having to come back here with Mr. Hoffman and
10 tie up a busy calendar with 2241 motions, 1983 motions,
11 violating my civil rights and any level of decency, I ask you,
12 Your Honor, that could you please order them to take me to a
13 surgeon and let them fix it arthroscopically. I am three,
14 four miles from some of the finest hospitals in New York, or
15 if I get sent to a facility, then let them do it there.
16 Because sometimes it is just difficult to continue on every
17 day in the type of pain that I am in.

18 I understand I have to be punished but it doesn't
19 have to be cruel and I ask you to please consider that as
20 well.

21 Finally, Your Honor, I want to thank Mr. Hoffman and
22 Susan. He has been with me for 17 years on an endless saga
23 that I caused. And I also would like to point out, Your
24 Honor, that in the gallery, my brother, who came today and I
25 just want to tell him I love him and that he's been very

1 supportive.

2 That's it, Your Honor.

3 Thank you.

4 THE COURT: The Court is obliged to consider all of
5 the 3553(a) factors in determining what an appropriate
6 sentence should be. The statute begins with advising the
7 Court that the sentence should be sufficient but not
8 excessive, and the Court should consider the nature and
9 circumstances of the offense, which have been referred to
10 obliquely here this morning.

11 Back in 2002, the defendant, nearly ten years ago,
12 pleaded guilty to a count in a 94-count indictment. Counts
13 one and thirteen of indictment number 00-1248, which charged
14 him and 27 other defendants or 28 other defendants with
15 conspiring to commit securities fraud, mail fraud, wire fraud
16 and also in Count Thirteen with laundering the money which
17 that securities fraud yielded. My recollection is that that
18 was somewhere in excess of \$5 million that was laundered.

19 A couple of days thereafter, on the seventh of
20 February, Mr. Berkun pleaded guilty to Count One of a
21 two-count indictment, charging him and others with conspiracy
22 to commit securities fraud. That was in connection with the
23 US Bridge stock, which resulted in a lost to investors of
24 \$200,000.

25 I should have indicated that with respect to that 29

1 count or 94-count 29 defendant securities fraud, that crime
2 resulted in investor loss of approximately
3 sixteen-and-a-half-million-dollars.

4 Not long after that, Mr. Berkun pleads guilty to
5 Count One of a two-count indictment, charging him and others
6 with conspiracy to launder the proceeds of a drug transaction.

7 And then some years go by and in 2010 he pleads
8 guilty to a single count charging him with attempt to commit
9 securities fraud, about which we have just heard, and then
10 just in April of last year, pleaded guilty before Judge Ross,
11 I believe it was, to income tax fraud, unpaid taxes of earned
12 income, of almost a million-and-a-half-dollars.

13 The history and characteristics of the defendant in
14 broad outline, 53 years old, brought up in circumstances that
15 can be aptly categorized as middle income circumstances. His
16 father owned a lacquer manufacturing business, which
17 Mr. Berkun ran for a while and sold it at a profit of about
18 \$700,000, I believe. He has a brother who is a pediatrician.
19 He married in 1990, separated 12 years later, subsequently
20 divorced, had two children with that union. He has a daughter
21 who is 19 and a son who is now 16, I believe.

22 Then in 2002, he commenced a relationship with
23 another, with whom he had been living since then, and with
24 whom he has had three children, who are I believe
25 approximately seven, six and five.

1 He is in pretty good health. He has some
2 cholesterol problems, takes Lipitor.

3 His brother wrote an eloquent letter suggesting that
4 Mr. Berkun may be suffering from a vitamin D deficiency, for
5 lack of sunlight. He also has an inguinal hernia that we just
6 heard about.

7 He is a college graduate, graduate of Yeshiva
8 University, and also was a graduate of the Hofstra Law School.
9 He was admitted to the Bar of New York in 1983 and resigned in
10 2002. I believe he's also admitted to the Bar of the State of
11 Florida, but that status is, I believe, just in limbo.

12 He has been steadily employed over the years, for
13 the most part in activity which was not lawful.

14 He also has been apparently a very, very successful
15 stamp collector. Stamp collections have been sold at auctions
16 for well over a million dollars.

17 Those are the history and characteristics of the
18 defendant, the nature and circumstances of the offense, which
19 brings me to 3553(a)(2), the need for imposing a sentence
20 which the Court is advised to determine by considering a
21 number of factors.

22 The seriousness of the offense. Serious offenses, I
23 would suspect if most persons were asked to state what they
24 regard as a serious offense, they would probably recite a list
25 of physical harm offenses, such as assault, battery, kidnap,

1 rape, robbery, burglary.

2 The harms that Mr. Berkun has committed over the
3 years, which are essentially white collar, to put it
4 euphemistically, referred to as white collar offenses,
5 property offenses, I received a sheaf of paper from a lawyer
6 representing some people in Germany. Over four thousand names
7 were sent to the Court and the sheaf of papers are about two
8 inches thick, which claims that over four thousand people were
9 bilked of an enormous sum of money, 4,438 private investors
10 were bilked somewhere between 56 to \$79 million.

11 MR. HOFFMAN: Can I comment on that Your Honor?

12 THE COURT: I am not finished. I will give you an
13 opportunity.

14 MR. HOFFMAN: I appreciate that. Thank you.

15 THE COURT: That was an event which allegedly
16 Mr. Berkun was involved with Mr. Arbel.

17 Putting those aside, the securities fraud in which
18 he was involved with that 94-count indictment and 28 other
19 people resulting in losses to investors of \$16 million. It is
20 not very difficult to imagine what \$16 million of loss to
21 investors represent in terms of collateral harm. These are
22 investors, hundreds of them, who were buying not blue chip
23 stock, buying penny stock, stock which was worth very, very
24 little. By way of sweatshop operations that were being
25 conducted by those defendants, inducing hundreds of people to

1 part with \$16 million, creating in them the illusion that they
2 are going to get rich. They are investing in stock which is
3 going to increase dramatically in value, and did increase
4 incrementally by these pump and dump tactics which were
5 engaged in.

6 It is not difficult to imagine how much of that
7 \$16 million may have represented savings that were put aside
8 for old age, savings that were put aside for the education of
9 a child, money that was needed for the support of an aged
10 parent.

11 I suppose some people might regard the harm which
12 was caused by that offense and those offenses as serious. I
13 do.

14 The victim impact of those security frauds are
15 outlined in paragraph 89 of the presentence report and persons
16 who were attempted to be contacted and reveal or claim what
17 their losses were. There were only 39 of them I think who
18 responded and those 39 yielded losses of 3,684,000.

19 Then in paragraph 90, you have this correspondence
20 from this lawyer in Montana who also represents these German
21 interests.

22 So there was significant victim impact.

23 Then the statute speaks of promoting respect for the
24 law. The record which I have broadly outlined quite clearly
25 manifests a disrespect for the law. I have had occasion to

1 say, unfortunately too frequently, that what is meant or what
2 I understand to be meant by 3553(a), telling the Court that
3 one of the objectives of sentencing is to promote respect for
4 the law, is to have the person standing before me understand
5 that that means respect the law or, to put it more bluntly,
6 the law means what it says, and you should understand that.
7 And you as a lawyer of all people should have understood, and
8 truly did, that the law means what it says. When the law says
9 don't commit securities fraud, which is another almost
10 euphemistic way of saying don't steal from unsophisticated
11 people, because that's what inducing them to part with money
12 amounts to, you were stealing, inducing people to buy stock
13 which was worthless and pocket millions of dollars doing that.

14 You knew it was wrong and you continued to do it
15 over the years and you continued to do it and even ten years
16 later, after you pleaded guilty to the securities fraud and
17 money laundering, you did it again, in 2010. You were doing
18 it over the years while you were earning substantial sums of
19 money, not paying taxes. You knew that was wrong and every
20 time you filled out a W-2 form or a 1040 form, you lied and
21 you were lying under oath because when you signed that return
22 you were certifying you were telling the truth. You were
23 telling the government you weren't earning anywhere near the
24 amount of money that you were earning and you weren't paying
25 taxes.

1 The unfortunate, almost tragic part of that, as you
2 have indicated, you are talented. You had a law degree. You
3 may not have become a multimillionaire practicing law but
4 whatever money you would have earned would have been earned
5 honestly.

6 Then 3553(a) tells the Court to do what is the
7 hardest thing for the Court to do, to determine what just
8 punishment is.

9 Regarding principles of sentencing, you shouldn't be
10 surprised about. You have talked about rehabilitation.
11 Rehabilitation is not an objective of sentencing. The statute
12 specifically says it. If you look at the statute which
13 created the Sentencing Commission and you look at Section 994
14 subdivision K of Title 28 of the United States Code, it
15 specifically says, rehabilitation is not an appropriate
16 objective of sentencing. If you look at 3582 of Title 18 of
17 the United States Code, it says the same thing.

18 Anybody with any experience, any knowledge of the
19 criminal justice system, knows that rehabilitation is not the
20 objective of sentencing. Any judge who is sending somebody to
21 prison because it is good for them ought to be impeached for
22 it. It isn't.

23 Incapacitation, that's not applicable to you, in the
24 sense that you are not dangerous, not dangerous in the sense
25 that you are a threat to inflict physical harm on others. But

1 whether you will continue to inflict the financial harm on
2 others, as you have been doing, I am not willing to make a
3 prediction about one way or another. Your record indicates
4 that despite the fact that you pleaded guilty to securities
5 fraud and money laundering back in 2002 didn't deter you from
6 doing it again back in 2010.

7 I would hope that when you are free again you will
8 listen to a little voice, which obviously you either don't
9 have inside you or you weren't listening to, little voice that
10 tells all of us, or most of us, not to do something we know to
11 be wrong. Most of us listen to that little voice. You knew
12 that what you were doing was wrong. That little voice
13 hopefully was there telling you that but you were ignoring it.

14 So what is left in determining just sentence?
15 General deterrence is a legitimate objective, to discourage
16 others like you to commit the crimes such as the ones that you
17 were committing, making it clear that the law means what it
18 says and look at what happened to Alan Berkun who had been
19 committing those crimes. You do it, you are going to suffer
20 the same fate. That's a legitimate objective of sentencing.

21 Anything less than imprisonment in your case would
22 depreciate the seriousness and the enormity of the crimes that
23 you have committed.

24 What all that is about is that the Court should
25 impose a sentence that should convey that the crime for which

1 the sentence is imposed is not just a minor traffic offense.
2 It is a serious, serious crime. The sentence should reflect
3 that.

4 The sentence should reflect that there is some
5 proportionality between the sentence that is being imposed on
6 you, who are privileged in many respects -- you are. You had
7 a college education. You had a law degree. The sentence
8 that's imposed should convey to some extent that those who are
9 privileged will be punished too.

10 All that having been said, Mr. Berkun, the most
11 difficult thing for any judge to do, certainly for me, is to
12 look another human being in the eye and say you are going to
13 be deprived of your liberty for a time and you are going to be
14 deprived of your liberty because you have breached an implicit
15 contract which all of us have with our community, the contract
16 being that we are not going to commit crimes. We are going to
17 try and live in a law-abiding way so that we can all live in a
18 civilized environment, in a civilized society.

19 When you have ignored that implicit agreement, you
20 have made a declaration that you don't want to live in
21 accordance with the laws of civilized society. So being
22 sentenced in effect is telling you that having made that
23 choice you are going to live outside the boundaries of
24 civilized society. That's the choice that you have made for
25 yourself. That's essentially what sentence is all about: You

1 have broken a very, very solemn contract which all of us have
2 to each other and with each other, and I have a responsibility
3 not only to you, Mr. Berkun, but to the community that sent
4 me here, to make sure that it is understood that serious
5 crimes will be punished with a degree of seriousness.

6 The sentence I am going to impose upon you may be
7 questioned insofar as whether it is serious or not. The law
8 requires us to sentence a young kid from the ghetto who has
9 not had a privileged upbringing and has been arrested with
10 five grams of crack to mandatory sentences which run up to
11 five or fifteen years, hasn't stolen millions of dollars.

12 Your guidelines begin, forgetting about the very
13 charitable agreement that the government has entered with the
14 defense as to segregating the sentence, your guidelines if
15 they were to be imposed in accordance with the advice that the
16 sentencing guideline provides would have been somewhere
17 between 290 some odd and 324 months. That would probably be
18 regarded by most reasonable people as perhaps excessive, even
19 for the crimes that you have committed.

20 So with respect to indictments numbered 00 CR 1248,
21 and 00 CR 930 and 01 CR 1457, which it was agreed had a total
22 offense level of 30 and a criminal history category of, I
23 think it was two, guideline is at 97 to 121 months, I am
24 sentencing you to a term of 60 months on those three
25 indictments.

1 On 10 CR 512 and 11 CR 214, I am sentencing you to
2 another term of 12 months, to run consecutively to the
3 60 months already imposed.

4 I am adding on each of those counts a term of
5 supervised release of three years; supervised release does not
6 run consecutively. They are concurrent. Although it would be
7 consecutive in terms of the 12-month sentence.

8 There is a special assessment of \$600.

9 I am not imposing a fine because the Probation
10 report indicates that the amount of restitution that will be
11 ordered would make a fine unnecessary, if not impossible and
12 unrealistic. So restitution will be ordered in the amount of
13 \$3,684,199.03 to be paid to the persons listed, I think it's
14 in paragraph 89. Restitution is to be paid \$25 quarterly
15 while you are incarcerated and thereafter ten percent of your
16 gross income you would be earning after you have been
17 released. The money should be sent to the Clerk of the Court.

18 The \$600 special assessment should be paid today.

19 There are a number of open counts and I think some
20 open indictments.

21 With respect to 00 CR 930, the government will move
22 to dismiss Count Two, I take it.

23 MS. NGUYEN: Yes, Your Honor.

24 THE COURT: That motion will be granted.

25 With respect to indictment number 00 CR 1248, the

1 defendant pleaded guilty to counts one and thirteen of the
2 first superseding indictment. As I understand it, the
3 government will move to dismiss all the other counts in that
4 94-count indictment of which Mr. Berkun is named, which are
5 counts six, seven, fourteen, fifty-two to fifty-five, sixty to
6 sixty-one, sixty-two to eighty-three. I think it would be
7 correct to say counts fifty-two to ninety-three are counts in
8 which Mr. Berkun has been named. I believe the government is
9 going to move to dismiss those open counts and the first
10 indictment which is still outstanding.

11 MS. NGUYEN: That is correct, Your Honor.

12 THE COURT: This is a superseding indictment. Is
13 that the government's motion?

14 MS. NGUYEN: Yes, Your Honor, it is.

15 THE COURT: And indictment 01 CR 1457, the defendant
16 pled guilty to Count One and the government will move to
17 dismiss Count Two?

18 MS. NGUYEN: Correct, Your Honor.

19 THE COURT: Granted.

20 Indictment 10 CR 512, there are no open counts and
21 there are no open counts on the 214 indictment. That's
22 11 CR 214.

23 MS. NGUYEN: That is correct, Your Honor.

24 THE COURT: I think I have indicated that there is a
25 \$600 special assessment. I am not imposing a fine.

1 I will recommend, in response to your request that I
2 order -- I cannot order the Bureau of Prisons with respect to
3 the assignment they may make to serve your sentence. I can
4 recommend and I will recommend that the Bureau of Prisons
5 designate you to a camp facility in the Miami area, or as
6 close to it as geographically possible.

7 If the Bureau of Prisons follows its stated policy,
8 they should designate a defendant as close as possible to his
9 family in order to continue to maintain some semblance of
10 family unity.

11 I will also try to direct the Bureau of Prisons to
12 provide with you the necessary medical attention that you
13 need, and I will do that.

14 I don't think there is anything left. Although I
15 think I interrupted you, Mr. Hoffman. There is something you
16 wanted to say? I think it was in connection your opinion
17 that --

18 MR. HOFFMAN: Just two quick matters. One is, I am
19 not sure if the bail was exonerated so I would ask the Court
20 to exonerate the bail.

21 THE COURT: If it hasn't been, So Ordered.

22 MR. HOFFMAN: Secondly, when Your Honor described
23 the --

24 THE COURT: With respect to bail, I don't know how
25 much -- who posted the bail and what is it? Does anybody know

1 offhand?

2 MR. HOFFMAN: It was basically I think his and his
3 mother's homes.

4 THE DEFENDANT: Both homes were posted.

5 THE COURT: We will exonerate the bail.

6 MR. HOFFMAN: Secondly, when Your Honor referred to
7 the fact of supervised release on the second sentence would
8 probably be consecutive since the sentence is consecutive,
9 Your Honor said the second sentence of 12 years. I think you
10 meant one year.

11 THE COURT: I said 12 months.

12 MR. HOFFMAN: Twelve months. I'm sorry.
13 Twelve months.

14 Thank you.

15 MR. MUELLER: Your Honor --

16 THE COURT: Total sentence is 72 months.

17 MR. MUELLER: Your Honor, I had one point to
18 clarify. Did the restitution figure that you gave of
19 \$3,684,199.03, does that -- that does not include the
20 restitution to the IRS?

21 THE COURT: I'm sorry. It does not, no.

22 The IRS -- I'm sorry. I neglected to add, I think
23 it was agreed, in the plea agreement, that he was going to
24 make restitution to the IRS in the amount of \$390,590.

25 MR. MUELLER: Thank you, Your Honor.

1 MS. NGUYEN: Thank you, Your Honor.

2 MR. HOFFMAN: That is correct.

3 MS. NANDAN: Your Honor, I neglected to hand up the
4 final order of forfeiture when I was speaking earlier. I will
5 do that.

6 THE COURT: Has the defense seen it?

7 MS. NANDAN: Yes, Your Honor.

8 MS. WOLFE: Your Honor, I have had the time to go
9 through the paragraphs that I thought would be injurious to
10 Mr. Berkun and they are each of the paragraphs in 102 through
11 129, refers to either organized crime or extortion.

12 My suggestion is, all of those -- shall I continue?
13 All of those paragraphs pertain to defendants in indictments
14 in which Mr. Berkun was not charged.

15 THE COURT: I will remind you that I think those
16 indictments charged Mr. Berkun with conspiracy.

17 MS. WOLFE: His indictment charges him with a
18 conspiracy, correct.

19 THE COURT: In all of those indictments, they were
20 all conspiracy and I don't think I have to review with you the
21 law of conspiracy, Ms. Wolfe.

22 MS. WOLFE: I am not making the argument you might
23 think I am making. I am making an argument why it wouldn't be
24 in any way misleading to anyone to take out those paragraphs
25 because they were not codefendants in the indictments in which

1 he was charged and the odd thing is that there is no
2 description of the codefendants in the 1248 case in which he
3 was charged. That's what's odd. Those paragraphs in the
4 previous PSI did not have references to extortions and
5 organized crime.

6 So I can do one of two things. I can ask Your Honor
7 to take out paragraphs 102 through 129 or just give you the
8 lines that I would ask -- that I would ask be redacted.

9 THE COURT: There is nothing in 129 that refers to
10 organized crime aside from the mention of Persico. People who
11 might be familiar with who Persico is would get the idea that
12 there is some organized crime involved. Otherwise, there is
13 no mention of organized crime in paragraph 129 that I am
14 looking at, unless I am missing it.

15 MS. WOLFE: No. Those -- the series of paragraphs
16 all have to do with the defendants who were charged in other
17 indictments, not 930, not 1248. That's why I lumped them
18 together. There are one, two, three, four, five, six, seven,
19 eight of those paragraphs specifically refer to organized
20 crime or extortion and I can send Your Honor a letter
21 identifying the language.

22 THE COURT: With respect to whatever reference there
23 may be, Ms. Wolfe, given the leniency of the sentence that I
24 have imposed, or at least the sentence which may be perceived
25 to be lenient, it is fairly obvious that those references did

1 not have a bearing on the sentence which I have imposed on
2 Mr. Berkun. Right?

3 MS. WOLFE: Absolutely, Your Honor.

4 Our concern always was what the Bureau of Prisons
5 would do.

6 THE COURT: I understand your concern. I think we
7 have eliminated the references to organized crime that are
8 specific. The other references refer to persons who are other
9 defendants and have no relationship to Mr. Berkun.

10 MS. WOLFE: Okay.

11 THE COURT: They are obvious.

12 I signed the order.

13 Did you want to say something?

14 MS. NGUYEN: Your Honor, I would just ask that you
15 advise the defendant of his right to appeal.

16 THE COURT: Yes. Thank you. I had that before me.
17 Mr. Berkun, you have a right to appeal your
18 sentence.

19 I don't know whether in the plea agreement he waived
20 his right to appeal if the sentences were not in excess of a
21 given amount. I don't know.

22 But, in any event, even if those plea agreements did
23 provide it, and even if you waived your right to appeal, I'm
24 sure if you did you did it knowingly and voluntarily, given
25 your legal background, I am advising you, Mr. Berkun, that you

1 have a right to appeal this sentence and if you can't afford
2 to pay for the costs of an appeal you can make an application
3 to have the costs waived.

4 Anything else?

5 Thank you for reminding me of that. I hadn't paid
6 attention to it.

7 Anything else?

8 MS. NGUYEN: Nothing further from the government,
9 Your Honor.

10 THE COURT: Anybody else?

11 MR. HOFFMAN: Nothing.

12 Thank you.

13 MS. WOLFE: Thank you, Your Honor.

14 MS. NGUYEN: Thank you, Your Honor.

15 THE DEFENDANT: Thank you, Your Honor.

16 (Matter concludes.)

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